Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors

HIGH COURT (KUANTAN) — CIVIL APPEAL NO 12–68 OF 2009
VT SINGHAM J
23 APRIL 2010

Civil Procedure — Striking out — Application to strike out action — Whether action time barred — Whether plaintiffs' cause of action accrued on date plaintiffs suffered damage — Whether the Interpretation Act 1967 could be used to construe period of limitation prescribed in s 6(1)(a) of the Act — Whether limitation could be raised after commencement of trial — Subordinate Courts Rules 1980 O 9 & O 14 r 21

On 21 May 2004, the registered owner of motorcycle No WCF9148 ('the first plaintiff') filed an action in tort for damages for the injuries and loss suffered by him and the second and third plaintiffs, who were the first plaintiff's pillion riders, as a result of a road accident on 21 May 1998. The second and third plaintiffs, who were infants at the time of the accident, filed the summons with the statement of claim at the sessions court through the first plaintiff, their father as their next friend. It was the plaintiffs' case that the damages and loss suffered by them was caused by the alleged negligence of the defendants, the registered owners and rider of motorcycle No CAF2043. The trial at the sessions court commenced on 9 July 2007, but by a notice of application dated 20 October 2008 and filed on 28 October 2008, the defendants applied to strike out the plaintiffs' statement of claim dated 21 May 2004 against them. The striking out application made pursuant to O 14 r 21(1)(a) of the Subordinate Courts Rules 1980 was made on the grounds that the plaintiffs' cause of action, which was filed on 21 May 2004, was time barred on 20 May 2004. The sessions court judge dismissed the defendants' application to strike out the plaintiffs' writ and statement of claim. This was the defendants' appeal against that decision. The defendants maintained that the plaintiffs' cause of action was time barred under s 6(1)(a) of the Limitation Act 1953 ('the Act') because the cause of action arose on the date of the accident, ie on 21 May 1998, which meant that the last date for the filing of the writ before the expiry of the six years period would be 20 May 2004. The sole issue in the present case was whether the plaintiffs' cause of action had accrued on the date the plaintiffs had suffered damage ie on 21 May 1998 and was therefore time barred.

Held, allowing the appeal with costs:

(1) The period of limitation as contained in s 6(1)(a) of the Act is mandatory and must be strictly observed unless there are sufficient facts to bring it

within the exception as provided under s 29(b) of the Act, which is not the case in the present case. On the facts in the present case, the court had no judicial discretion to enlarge the period of limitation prescribed by s 6(1)(a) of the Act or postpone its operation or introduce exceptions not provided by law. In interpreting a provision in a statute prescribing a period of limitation for instituting a proceeding, questions of equity and hardship were out of place (see paras 4 & 7).

(2) The Limitation Act is special law and is a complete code by itself, which excludes the operation of or the benefit of calling in the aid of the Interpretation Acts 1948 and 1967 to construe the period of limitation prescribed in s 6(1)(a) of the Act. The language of s 6(1)(a) of the Act is plain and clear and refers to the period of limitation starting from the date when the cause of action arose. In the present case the cause of action arose on the date of the accident, 21 May 1998, when the plaintiffs suffered injuries and damage. As such, the commencement of the limitation period in the present case was on 21 May 1998, and there was no need to resort to the Interpretation Acts in order to determine when the cause of action arose or to define the period of limitation prescribed under s 6(1)(a) of the Act. In the present case the plaintiffs suffered injuries arising out of the accident on 21 May 1998 and the action became statute barred on 20 May 2004 (see paras 8–9, 11 & 14).

(3) The fact that the defendants' application to strike out the plaintiffs' claim on the grounds that the action was time barred was filed after the trial had commenced was not fatal to strike out the summons as the trial was still pending for continuation of the hearing. There was also no question of waiver or acquiescence and the defendants ought to be allowed to raise the defence of limitation period at any stage of the proceedings (see para 12).

(4) The fact that two of the plaintiffs were infants as the material time was of no significance, in respect of the issue of limitation, as their action can still be filed pursuant to O 9 of the Subordinate Courts Rules 1980 by their next friend and which was in fact filed on their behalf (see para 15).

[Bahasa Malaysia summary

Pada 21 Mei 2004, pemilik berdaftar motosikal No WCF9148 ('plaintif pertama') memfailkan tindakan tort untuk ganti rugi bagi kecederaan dan kehilangan yang dialaminya dan plaintif-plaintif kedua dan ketiga, pembonceng motosikal plaintif pertama, akibat kemalangan jalan raya pada 21 Mei 1998. Plaintif-plaintif kedua dan ketiga, yang masih kanak-kanak pada masa kemalangan tersebut, memfailkan saman dengan penyata tuntutan di mahkamah sesyen melalui plaintif pertama, bapa mereka sebagai sahabat wakil. Ia adalah kes plaintif bahawa ganti rugi dan kehilangan yang dialami mereka disebabkan kecuaian defendan-defendan, pemilik-pemilik berdaftar dan

penunggang motosikal No CAF2043. Perbicaraan di mahkamah sesyen bermula pada 9 Julai 2007, tetapi melalui notis permohonan bertarikh 20 Oktober 2008 dan difailkan pada 28 Oktober 2008, defendan-defendan memohon untuk membatalkan penyata tuntutan plaintif-plaintif bertarikh 21 Mei 2004 terhadap mereka. Permohoan pembatalan tersebut dibuat berikutan A 14 k 21(1)(a) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') atas alasan bahawa kausa tindakan plaintif yang difailkan pada 21 Mei 2004, dihalang oleh had masa pada 20 Mei 2004. Hakim mahkamah sesyen menolak permohonan defendan-defendan untuk membatalkan writ dan penyata tuntutan plaintif-plaintif. Ini adalah rayuan defendan-defendan terhadap keputusan tersebut. Defendan-defendan mengekalkan bahawa kausa tindakan plaintif-plaintif adalah dihalang masa di bawah s 6(1)(a) Akta Had Masa 1953 ('Akta') kerana kausa tindakan berbangkit pada tarikh kemalangan iaitu pada 21 Mei 1998, yang bermaksud bahawa tarikh akhir untuk memfailkan writ sebelum tamat tempoh enam tahun ialah 20 Mei 2004. Satu-satunya isu di dalam kes ini adalah sama ada kausa tindakan plaintif-plaintif terakru pada tarikh plaintif-plaintif mengalami kehilangan iaitu pada 21 Mei 1998 dan oleh itu dihalang oleh had masa.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tempoh had masa seperti di dalam s 6(1)(a) Akta adalah mandatori dan mesti dipatuhi dengan betul kecuali terdapat fakta yang memadai untuk dibawa ke dalam pengecualian seperti yang diperuntukkan di bawah s 29(b) Akta, yang mana bukan perkara sebegitu di dalam kes ini. Atas fakta dalam kes ini, mahkamah tidak mempunyai budi bicara kehakiman untuk melanjutkan tempoh had masa yang ditetapkan oleh s 6(1)(a) Akta atau menangguhkan operasinya atau mengemukakan pengecualian yang tidak diperuntukkan oleh undang-undang. Di dalam mentafsirkan peruntukan di dalam statut yang menetapkan tempoh had masa untuk memulakan prosiding, soalan-soalan ekuiti dan kesukaran adalah di luar skop (lihat perenggan 4 & 7).

(2) Akta Had Masa adalah undang-undang istimewa dan adalah kod lengkap secara sendirinya, yang mana mengecualikan operasi atau faedah untuk mendapatkan bantuan Akta Tafsiran 1948 dan 1967 untuk mentafsirkan tempoh had masa yang ditetapkan di dalam s 6(1)(a) Akta. Bahasa s 6(1)(a) Akta adalah biasa dan merujuk kepada tempoh had masa bermula dari tarikh di mana kausa tindakan berbangkit. Dalam kes ini kausa tindakan berbangkit pada tarikh kemalangan 21 Mei 1998, apabila plaintif-plaintif mengalami kecederaan dan kerosakan. Oleh itu, permulaan tempoh had masa di dalam kes ini adalah pada 21 Mei 1998, dan tidak terdapat keperluan untuk merujuk kepada Akta Tafsiran untuk menentukan bila kausa tindakan berbangkit atau untuk mentafsirkan tempoh had masa yang ditetapkan di bawah s 6(1)(a) Akta. Dalam kes ini, plaintif-plaintif mengalami kecederaan berbangkit daripada

kemalangan pada 21 Mei 1998 dan tindakan dihalang statut pada 20 Mei 2004 (lihat perenggan 8–9, 11 & 14).

(3) Fakta bahawa permohonan defendan-defendan untuk membatalkan tuntutan plaintif-plaintif atas alasan bahawa tindakan adalah dihalang masa difailkan selepas perbicaraan bermula adalah tidak cacat untuk membatalkan saman kerana perbicaraan masih menunggu untuk penyambungan pendengaran. Juga tidak terdapat persoalan penepian atau keakuran dan defendan-defendan patut dibenarkan untuk membangkitkan pembelaan tempoh had masa pada mana-mana peringkat prosiding (lihat perenggan 12).

(4) Fakta bahawa dua daripada plaintif-plaintif adalah kanak-kanak pada masa material tidak penting, berkaitan isu had masa, kerana tindakan mereka masih boleh difailkan berikutan A 9 KMR oleh sahabat wakil dan yang mana sebenarnya difailkan bagi pihak mereka (lihat perenggan 15).]

Notes

For cases on application to strike out action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6696–6702.

Cases referred to

Appalasamy Somuloo v Bong Kim Chuan & Anor [1985] CLJ Rep 398, HC (distd)

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor [2002] 2 MLJ 11, FC (refd)

Great Eastern Life Assurance Co Ltd, The v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon) [2006] 2 MLJ 209; [2005] 4 CLJ 717, FC (refd)

Jambekar v State of Gujarat [1973] SCR (2) 714; AIR 1973 SC 309 (folld)

John v Summer AIR 1943 Sind 33; ILR 1942 Karachi 466 (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Lim Yoke Kong v Sivapiran a/l Sabapathy [1992] 2 MLJ 571; [1992] 1 CLJ Rep 184, SC (folld)

Luchmee v Runjee (1873) 20 WR 375, PC (refd)

Mt Bolo v Mt Koklan & Ors AIR 1930 PC 270 (folld)

Nagendra Nath Dev & Anor v Suresh Chandra Dev & Ors AIR 1932 PC 165 (refd)

Ong Ah Bee v Hii Chung Siong, Robin [1364] MD 2; [1993] 1 CLJ 504, HC (folld)

Pirelli General Cable Works Ltd v Oscar Faber & Partners (A Firm) [1983] 2 AC 1, HL (folld)

Rhodesia Rly Ltd v Resident Comms Bechuanaland (1933) 146 IC 926, PC (refd)

Sparham-Souter and another v Town and Country Developments (Essex) Ltd and another [1976] QB 858, CA (refd)

A *Thomson v Lord Clanmorris* [1900] 1 Ch 718, CA (refd)
Trengganu Forest Products Sdn Bhd v Cosco Container Lines & Anor [2007] 5 MLJ 486; [2007] 5 CLJ 720, HC (refd)

Legislation referred to

B Interpretation Acts 1948 and 1967 s 54, 54(1)(a)
Limitation Act 1953 ss 6(1)(a), 29(b)
Subordinate Courts Rules 1980 O 9, O 14 r 21(1)(a)

Ruben Netto (JS Naiker with him) (Naiker & Associates) for the applicants.
C *Joseph Au (Elango with him) (Omar & Joseph Au) for the respondents.*

VT Singham J

[1] This is an appeal by the appellants against the decision of the learned
D Sessions Court judge, Kuantan, wherein the appellants' application to strike out the respondents' claim against the appellants on the ground that the 'cause of action' was time barred under s 6(1)(a) of the Limitation Act 1953 was dismissed on 23 April 2009. The appellants' application to strike out the respondents' claim was made under O 14 r 21(1)(a) of the Subordinate Courts
E Rules 1980 on the ground that it discloses no reasonable cause of action. For the purpose of this judgment, the appellants and the respondents will be referred to as the defendants and plaintiffs respectively.

[2] The brief facts of the case are as follows:

F

(a) The first plaintiff as the registered owner and rider of motorcycle No WCF 9148 and the second and third plaintiffs as pillion riders had filed a summons with the statement of claim dated 21 May 2004 at the Sessions Court, Kuantan on 21 May 2004 against the defendants, the
G registered owners and rider of motorcycle No CAF 2043.

(b) The plaintiffs' action was for damages under the law of tort of negligence arising out of a road accident on 21 May 1998. The second and third plaintiffs being infants at the material time of the accident had filed the summons through the first plaintiff, being their father as their next
H friend (O 9 of the Subordinate Courts Rules 1980).

(c) On 23 September 2004 the statement of defence, counterclaim and set off dated 21 September 2004 was filed on behalf of the defendant.

(d) On 22 May 2006 notice of change of solicitors dated 15 May 2006 was
I filed by Tetuan Naicker & Associates on behalf of the defendants.

(e) Subsequently, the defendants having obtained an order of court dated 2 October 2006 to amend the statement of defence had filed an amended statement of defence, counterclaim and set off dated 2 October 2006 on 1 February 2007.

(f) On 12 June 2007 the reply and defence dated 31 May 2007 on behalf of the plaintiffs to the defendants amended statement of defence, counterclaim and set off was filed.

(g) On 9 July 2007 the trial at the Sessions Court, Kuantan commenced and two witnesses had testified.

(h) On 28 October 2008, the defendants had filed a further amended statement of defence, counterclaim and set off dated 25 September 2008 pursuant to an order of court dated 25 September 2008 where the defence of limitation, namely, the plaintiffs' claim was statute barred was pleaded.

(i) By a notice of application dated 20 October 2008 filed on 28 October 2008, the defendants had applied to strike out the plaintiffs' statement of claim dated 21 May 2004 against them. The said application was made on the ground that the plaintiffs' cause of action was time barred on 20 May 2004 whereas the plaintiffs' action was filed only on 21 May 2004.

(j) The defendants had relied on s 6(1)(a) of the Limitation Act 1953 ('the said Act'). Section 6(1)(a) of the said Act states:

(1) *Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued*, that is to say:

(a) *actions founded on a* contract or on *tort*;

(k) On 30 September 2009 the plaintiffs had filed a reply and defence dated 30 January 2009 to the further amended statement of defence, counterclaim and set off dated 25 September 2008.

DECISION

[3] The sole question to be decided in the present case is, whether, *the cause of action* had accrued on the date the plaintiffs had suffered damage ie on 21 May 1998 in order to determine the period of limitation prescribed by s 6(1)(a) of the said Act, or on the following date ie on 22 May 1998. As the legal issue raised in the present case is obviously one of considerable importance both to clients and solicitors and to the insurers of motor vehicles, this court has set out its 'reasoning in extenso'. This court is of the considered view that if the cause of action arose on 21 May 1998, ie on the date the plaintiffs had suffered damage ie on 21 May 1998 arising out of the said accident, then the last date for the *cause of action* to survive before the expiry of the six years period will be

20 May 2004. Accordingly, the plaintiffs' action which was filed in court on 21 May 2004 was time barred. On the other hand, if the date on 21 May 1998 was to be excluded and the *cause of action* arose only on 22 May 1998, then the plaintiffs' action which was filed in court on 21 May 2004 was not time barred and was within the period of six years. At this stage, it is important to stress that s 6(1)(a) of the said Act expressly speaks of 'cause of action' which must necessarily be and accrued on the date the plaintiffs had suffered injuries and damage in the said accident on 21 May 1998.

[4] This court is of the considered view that the period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed on the ground of equitable consideration. The provision of s 6(1)(a) of the said Act are mandatory in nature. This court has no discretion or inherent powers to condone the delay if the action is filed beyond the prescribed statutory period of limitation or if the cause of action is barred by limitation unless the matter is covered by any of the exceptions which is not the case in the present case. Therefore, this court has not only the power but also the duty to consider as to whether the action is time barred, and if it is found to be time barred, the court is duty bound to strike out the action.

[5] In the present case, where the defence of limitation is raised, the burden to prove that the action was commenced within the limitation period shifts to the plaintiff (see *Ong Ah Bee v Hii Chung Siong, Robin* [1364] MD 2; [1993] 1 CLJ 504 at p 505). Under the Limitation Act, the time barred is absolute.

> 'It has been said that in negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which causes the damage', per Steve Shim J (as he then was) (*Beckhouse v Bonomi* [1861] 9 HL Cas 503; *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571).

In *Cartledge v E Jopling & Sons Ltd* [1963] 1 All ER 341, Lord Pearce said:

> I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proven an accrual of damage within the six years ... the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date.

'A person has cause of action in tort when he has been wronged and he has suffered harm as a result of that wrong' (*The Bank of East Asia Limited v Tsein Wai Marble Factory Limited and Ors* [1997] HKCU 39).

[6] Law of limitation is based on well known doctrine 'interest reipublicae ut sit finis litium', ie, it is in the interest of the state that there should be an end to litigation process. However whether the defence of limitation is available to a

defendant is an issue of law depending on a finding of fact. The rationale behind the statue of limitation is based on the maxims 'interest reipublicae ut sit finis litium' the interest of the state requires that there should be a limit to litigation and 'vigilantibus, non dormientibus jura subveniunt' — the law aid the vigilant and not those who slumber. In the present case, where the defence of limitation is raised, the burden to prove that the action was commenced or instituted within the limitation period shifts to the plaintiffs (*Ong Ah Bee v Hii Chung Siong, Robin* [1364] MD 2; [1993] 1 CLJ 504 at p 505).

In *Industrie Chimiche Italia Centrale and another v Alexander Tsaviliris & Sons Maritime Co and others; The Choko Star* [1996] 1 All ER 114, Mande J said at p 123:

> The underlying rationale of limitation periods to protect against stale claims which should have been brought earlier (see *Intterscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd (formerly known as United Malayan Insurance Co Bhd)* [2007] 3 MLJ 232 at pp 251–252; [2007] 2 CLJ 370 at pp 390–391).

[7] In this jurisdiction, the period within which a cause of action under the law of tort ought to be filed in court or instituted is prescribed by the Limitation Act 1953. As stated, the object of limitation is to extinguish stale demands or actions (see *John v Summer* AIR 1943 Sind 33 at p 36; ILR 1942 Karachi 466, *Luchmee v Runjee* [1873] 20 WR 375 (PC)). Limitation is not unjust for a discreditable defence and there is nothing morally wrong for a defendant to rely upon it (*Rhodesia Rly Ltd v Resident Comms Bechuanaland* [1933] 146 IC 926 at p 927 (PC)). On the facts in the present case, this court has no judicial discretion as correctly contended by learned counsel for the plaintiff to enlarge the period of limitation prescribed by s 6(1)(a) by the said Act or postpone its operation or introduce exceptions not provided by law or whatever hardship the plaintiff may be able to establish (see *Nagendra Nath Dev & Anor v Suresh Chandra Dev & Ors* AIR 1932 PC 165). In interpreting a provision in a statute prescribing a period of limitation for instituting a proceeding, questions of equity and hardship are out of place (*Jambekar v State of Gujarat* 1973 SCR (2) 714; AIR 1973 SC 309).

> The construction given by this court may be a 'hard and narrow view of the law' but this court cannot decline to give effect to this clearly expressed statute just because this court finds it may lead to apparent hardship or serious consequences to the plaintiffs (Lindley LJ in *Young & Co v Mayor, etc of Leamington* (1882) 8 QBD 579 at p 585; (1983) 8 App Cas 517).

[8] A litigant, like the plaintiff in the present case, with a statute barred grievance cannot seek the indulgence of the court to rule that the last date of filing the action against the defendants is 21 May 2004 as, if the court were to so rule that would tantamount to asking this court to remove the statute barred provision of the said Act to which this court has no power and that would result

in logger head with the Legislature. The Limitation Act is special law and is a complete code by itself and excludes the operation of or the benefit of calling in the aid of the Interpretation Acts 1948 and 1967 to construe the period of limitation prescribed in s 6(1)(a) of the said Act. The language of s 6(1)(a) of the said Act is plain and clear, and that the period of limitation refers to the 'cause of action'. In the present case, the cause of action arose on 21 May 1998 when the plaintiffs suffered injuries and damage. Therefore, there is no need to resort to the Interpretation Acts, in order to determine when the cause of action arose or to define the period of limitation as prescribed in s 6(1)(a) of the said Act. In the considered view of this court, to resort to the Interpretation Act 1948 and 1967 would amount to seeking outside aid which on the facts in the present case is unwarranted and an 'illegitimate course' under the circumstances. Section 54 of the Interpretation Acts 1948 and 1967 therefore has no application to the facts in the present case and this court does not require any other statutory aid to consider and interpret s 6(1)(a) of the said Act. It is also not the function of this court to scan, engraft, add or imply anything which is not expressly stated in the said Act in order to assist the plaintiffs to circumvent the limitation period of six years.

[9] On the facts in the present case, the cause of action in tort for damages for the injuries and loss suffered by the plaintiffs allegedly caused by the first defendant's negligence arose on the date when the plaintiffs had suffered the injuries or the plaintiffs had suffered physical damage on 21 May 1998. The plaintiffs' cause of action therefore had accrued on 21 May 1998 when the plaintiffs suffered physical damage as a result of the alleged negligent act of the first defendant. The commencement of the limitation period in the present case against the defendants was on 21 May 1998 (*Pirelli General Cable Works Ltd v Oscar Faber & Partners (A Firm)* [1983] 2 AC 1; *Sparham-Souter and another v Town and Country Developments (Essex) Ltd and another* [1976] QB 858; *Thomson v Lord Clanmorris* [1900] 1 Ch 718 at pp 728–729). In the present case, the period of limitation, being the six years period commenced to run from the date the bodily injury was suffered by the plaintiffs ie on 21 May 1998 which is the date when the cause of action accrued (*Mt Bolo v Mt Koklan & Ors* AIR 1930 PC 270).

In *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409, Hashim Yeop A Sani CJ (Malaya) said at pp 413–414:

> The limitation law is promulgated for the primary object of discouraging the plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest reipublicae ut sit finis litium that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

In *Yew Bon Tew & Anor v Kenderaan Bas MARA* [1983] 1 MLJ 1, Lord Bridghtman for the Privy Council said at p 5: A

> When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proof of witnesses which have been taken, discharge his solicitor if he had been retained and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence. B

In *Government of Malaysia v Ng Song Choon* [1975] 1 MLJ 131, Arunandom J said at p 132: C

> Limitation is a good defence plea in law and no court can adjudicate on it without a trial and without having the facts proved. When the plea that a claim is statute barred is raised in court it precludes any question of legality, correctness or rights. All it means is that no claim for the enforcement of that right can be entertained by the courts and no relief can be given by the courts. To give a simple example there may be a lawful debt due by the defendant to the plaintiff but if the claim is made after the period of limitation the court will not grant relief. The question of merits does not arise. D

In *Dobbie v Medway Health Authority* [1994] 4 All ER 450, Sir Thomas Bingham MR said at p 454: E

> The ordinary rule is that time begins to run against a claimant when common law cause of action arises, and the cause of action becomes unenforceable if proceedings have not been started before expiry of a period of years prescribed by statute. This rule may have the harsh effect of defeating what would otherwise be unanswerable claims. But such rules have existed for centuries. They are no doubt designed in part to encourage potential claimants to prosecute their claims with reasonable expedition on pain of being unable to prosecute them all. But they are also based on the belief that a time comes when, for better or worse, defendants should be effectively relieved from the risk of having to resist stale claims. F G
>
> 'It is inevitable that a statute of limitation will, on occasion, lead to injustice in the special circumstances of particular cases. Such injustice, when it occurs, is an unavoidable cost of the benefits involved in ensuring that the plaintiffs act promptly and that the defendants are not subjected to the litigation of stale claims' (Deane J in *Hawkins v Clayton and Others* 78 ALR 69 at p 105). H
>
> Under s 6(1)(a) of the said Act, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrues. The cause of action in negligence accrues when the damage caused by the negligent act or omission occurs (*People's Parkway Development Pte Ltd v Ramananthan Yogendran* [1991] 1 MLJ 325; [1990] SLR 991). I

In that case, the High Court (LP Thean J) held that the plaintiff's cause of action in negligence had accrued more than six years before the commencement of the action and was therefore statute barred.

Note:

The plaintiffs' appeal to the Court of Appeal vide Civil Appeal No 36 of 1992 against the decision of the High Court was dismissed on 18 January 1993.

The plaintiffs' cause of action in the tort of negligence arose when the alleged negligence act had been committed and the plaintiffs had suffered damage. In the circumstances, the plaintiffs had to sue the defendants within the time limited under s 6(1)(a) of the said Act. The time under s 6(1)(a) of the said Act begins to run from the accrual of that cause (*Lian Kok Hong v Ow Wah Foong & Anor* [2007] 4 SLR 742 and affirmed by the Court of Appeal in [2008] 4 SLR 165).

[10] In fact, even in cases founded on the law of contract governing limitation of actions as provided in s 6(1)(a) of the Act which may be of some relevance for the purpose of the present case, the Federal Court in *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209; [2005] 4 CLJ 717 said at p 216 (MLJ); p 724 (CLJ):

The law on when a cause of action accrues is already well settled and very musch entrenched in our jurisprudence which is this. *A cause of action founded on contract accrues on the date of its breach and that time begins to run from that breach*. (Emphasis added.) (See also *Tan Boon Yen dan lain-lain lwn Mayban General Assurance Bhd* [2003] 5 MLJ 315; [2003] 2 CLJ 268).

However, it is important to refer to two cases cited by learned counsel for the defendants, namely, *Lim Yoke Kong v Sivapiran a/l Sabapathy* [1992] 2 MLJ 571; [1992] 1 CLJ Rep 184 and *Appalasamy Somuloo v Bong Kim Chuan & Anor* [1985] CLJ Rep 398 where the facts are distinguishable when compared to the facts in the instant case. In *Lim Yoke Kong v Sivapiran Sabapathy* [1992] 2 MLJ 571; [1992] 1 CLJ Rep 184, the court had invoked s 29(b) of the said Act on the particular set of facts which fitted with the exception to the six years limitation period. In that case, the plaintiff, a pedestrian suffered injuries as a result of a road accident on 1 April 1977 where he was negligently knocked down by a motorcyclist. However the plaintiff was unable to obtain the particulars of the insurers of the motorcycle within the six years period. In that case, the court found an element of fraud where the insurers had concealed the fact that they were the insurers at the material time. Therefore, s 29(b) of the said Act was applied and the plaintiffs' claim was found not to be caught by the six years period of limitation. In any event, in that case, the Federal Court at p 187 said:

under s 6(1)(a) of the said Act, any action against the motorcyclist based on his pgbrk id="9-mlj-614" negligence would become *statute barred on 31 March 1983*.

[11] In other words, it is clear from the observation that the Federal Court had taken into account the date of the accident on *1 April 1977* where the plaintiff had suffered injuries for the purpose of determining the last date of survival of the cause of action. The Federal Court ruled that the cause of action *would become statute barred on 31 March 1983*. The Federal Court had once again said at p 189 and p 190 that the *expiry of the limitation period was on 31 March 1983* which meant that the cause of action had accrued on 1 April 1977, the date of the accident and the last date for filing the action was 31 March 1983. Similarly, in the present case, the plaintiffs suffered injuries arising out of the accident on *21 May 1998* and the action became *statute barred on 20 May 2004*.

[12] In *Appalasamy Somuloo v Bong Kim Chuan & Anor* , the court had also applied s 29(b) of the said Act as by the time the motor insurance bureau discovered the insurers, the action was already time barred.

In *Letang v Cooper* [1965] 1 QB 232 Lord Justice Diplock had defined at p 242–243 the words 'cause of action'.

A factual situation the existence of which entitled one person to obtain from the court a remedy against another (see *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 at p 233; [1987] 1 CLJ 126 at p 128).

In *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 which followed the case *Bank Bumiputera Malaysia Berhad & Anor v Lorraine Esme Osman; Bank Bumiputera Malaysia Berhad & Anor v Lorraine Esme Osman & Ors* [1987] 2 MLJ 633, there was no issue of statutory limitation as raised in the present case. In that case, the court's ruling was solely on when an application to strike out pleadings should be made and that it should be struck out if the application is made after the action had been set down for trial. Whereas, in the present case, the legal issue is statute of limitation.

[13] This court is of the considered view that the issue of statute of limitation could be raised and an application to strike out the plaintiffs claim could be made at any stage of the proceedings which would also include during the course of a trial, in particular, when the claim is obviously unsustainable in law. In the present case, the fact that the said application to strike out the plaintiffs' claim was filed after the trial had commenced is not fatal to strike out the summons which is caught by s 6(1)(a) of the said Act as the trial is still pending for continuation of the hearing. There is also no question of waiver or acquiescence and the defendants should be allowed to raise the defence of limitation period at any stage of the proceedings. Therefore, the defendants' application to strike out the plaintiffs' action which was filed after the trial had commenced, on the ground that the action was time barred is not fatal and is

in order although parties are discourage to do so at a late stage of the proceedings (*Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663; *Trengganu Forest Products Sdn Bhd v Cosco Container Lines & Anor* [2007] 5 MLJ 486; [2007] 5 CLJ 720).

[14] This court has considered closely the facts in the present case and the will of Parliament as expressed in s s 6(1)(a) of the said Act and find that the provision of s 6(1)(a) is mandatory and must be strictly observed unless there are sufficient facts to bring it within the exception as provided under s 29(b) of the said Act, which is not the case in the present case. This court regrets that the court has no alternative but to find that the plaintiffs' action which was filed on 21 May 2004 was statute barred and that the action filed in court was late by one day as the last date for filing the action in court was 20 May 2004 and not 21 May 2004. Having taken into account the date of the accident on 21 May 1998 and having formed the view that s 54 of the Interpretation Acts 1948 and 1967 is not relevant to determine the period of limitation on the facts of the present case, this court is of the considered view that the last date for filing the summons against the defendants in court was on 20 May 2004 and not 21 May 2004. As the summons which was filed in court on 21 May 2004 was out of time, the plaintiffs' action was statute barred as it was filed outside the six years period and ought to be stuck out.

In *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558, the action was filed at the High Court. The issue was, whether a defendant who had filed an unconditional appearance could apply to strike out under O 18 r 19(1) of the RHC 1980 and the court answered in the negative (see also *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241). However, in the present case, the action was filed at the sessions court. Under the Subordinate Courts Rules 1980, there is no provision to enter conditional appearance.

[15] This court is also of the considered view that where the cause of action lies not in a specific act or omission but in resulting damages, the period of limitation runs from the time when the plaintiffs sustained the loss and damage. On the facts in the present case, this court also finds that the fact that two of the plaintiffs were infant at the material time is of no significance in so far as the statute of limitation as action can still be filed pursuant to O 9 of the Subordinate Courts Rules 1980 by their next friend and which was in fact filed on their behalf.

In *Abdulla Mahomed Jabli v Abdulla Mahomed Zulaikhi* AIR 1924 Bom 290 the defendant threw salphuric acid in the face of the plaintiff, which resulted in injury to his eye which ultimately resulted in the loss of one of his eyes. The act of the defendant was itself sufficient to give rise to a cause of action for damages for the

personal injury. Shah Ag CJ *held* that time would run from the date when the act of throwing sulpharic acid was committed and not from the date when the specific injury, ie loss of the eye had resulted and that the suit ought to have been filed within one year from the date when the injury was committed.

In any event, the exclusion of time provided in s 54(1)(a)of the Interpretation Acts, ie the day from which period is to be reckoned, does not apply to the present case. The period of limitation in the present case is based on when the cause of action had accrued and the period of limitation is computed in accordance with the provisions of the said Act. When the statute expressly says one thing which is plainly clear, this court should not alter that clear statutory provision and hold the mandatory provision as directory.

'This court can say what Parliament has said and not what ought to have been said' (Lord Coteridge CJ in *R v Mansed Jones* (1889) 23 QBD 29 at p 32).

In other words, it is the duty of the court to give a purpose interpretation to s 6(1)(a) of the said Act (*DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11 at p 21).

When the plea that a claim is statute barred is raised in court it precludes any question of legality, correctness or rights. All it means is that no claim for the enforcement of that right can be entertained by the courts and no relief can be given by the courts.

Undoubtedly, this action involves a case of negligence and therefore falls under item 97 of the Schedule of the Limitation Ordinance (Cap 49) in which the limitation period is six years from the accrual of the right to sue.

It has been said that in negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which causes the damage (see *Beckhouse v Bonomi* (1861) 9 HL Cas 503; *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571).

[16] In the light of the authorities, it is an inescapable conclusion that s 6(1)(a) of the said Act operates against the plaintiffs as the action against the defendants was filed in court after the limitation period on 20 May 2004. In the circumstances, the plaintiffs' action which was filed in court on 21 May 2004 was statute barred and ought to be struck out. Accordingly, the appeal by the defendants is allowed with costs. The decision of the learned sessions court judge given on 23 April 2009 is set aside and the plaintiffs' action is struck out.

Appeal allowed with costs.

Reported by Kohila Nesan